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COPYRIGHT CONCERNS IN VISUAL RESOURCES COLLECTIONS: CLARIFYING THE ISSUES SURROUNDING THE USE OF IMAGES IN EDUCATION

Caitlain Devereaux Lewis*

*“Speaking to a lawyer about pictures is something
like talking to a butcher about humanity.”*

—John Constable (1776–1837), English landscape
painter.¹

I. INTRODUCTION

The instruction of architecture, art, design, and related subjects relies heavily on the use of projected imagery in the classroom. Institutions of higher education traditionally met this need by acquiring or creating image surrogates to substitute for the actual creative works. This led to the gradual development of institutional visual resources collections. While formerly composed of film-based slides, today’s surrogate image collections are increasingly in digital form. In place of the rows of slide cabinets, with their drawers stocked with carefully cataloged and filed slides, visual resources professionals have evolved a digital version of this practice with digital images carefully cataloged and arranged on network server drives.

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1. Letter from John Constable to John Bishop, Bishop of Salisbury (Jan. 17, 1824).

The transition to digital images immediately brought copyright concerns to light. While the traditional practices of visual resources collections purportedly fell within the fuzzy parameters of fair use, the digital version of these practices called this assumption into question. The situation is further muddled by the fact that such images represent a dual-copyright framework: the underlying work (i.e., the original painting) may be copyrighted separately from the derivative image, which may be copyrighted in turn by the photographer.

This practice-oriented examination attempts to pinpoint how a change in medium, from analog to digital, modifies the copyright framework, incorporating an analysis of the former practices and the related copyright implications. After examining the legal framework of copyright law, several fair use guidelines that have been developed over time will be examined and rejected, and an inverted approach to examining these issues is proposed. What emerges from this study is the surprising conclusion that while the format change from analog to digital has brought increased attention to the practices of visual resources collections, the format shift does not change the underlying copyright concerns. The main copyright issues in visual resources collections continue to revolve around image acquisition, and the digital environment appears to merely exacerbate the preexisting copyright concerns.

II. THE USE OF IMAGES IN EDUCATION: A PORTRAIT OF THE PRACTICE

A. History

The fundamental need for visual art images for the instruction of art and design-related classes was traditionally fulfilled by carefully curated slide collections, purportedly developed in conformity with the fair use doctrine. Such collections were developed either as part of an institution's main library or within separate visual resources collections.² As the use of analog slides

2. Visual resources collections have come in many different forms with various labels over the decades: art libraries, image libraries, media centers, slide collections, slide libraries, visual resources libraries, etc. Some are

became outmoded, institutions of higher education began to transition to the use of digital imagery in the classroom, which immediately drew attention to the copyright concerns posed by the activities of such collections. Indeed,

[w]hatever copyright complexities were faced in a pre-digital world have been dwarfed by those in our current digital learning environment. Internet technology has fundamentally transformed how our students learn, how our scholars teach, how academic research is disseminated, and how libraries function. Today, there are many new ways in which intellectual property can be taught, read, shared, copied, disseminated, stolen, and lost.³

While scrambling to stay current with instructional technologies, visual resources professionals⁴ also began wrestling with copyright law to determine the acceptable parameters of their activities.⁵

independent entities, while others are departmental collections or branches of the main library. For ease of discussion, this article will refer to all such collections as “visual resources collections.” Some contemporary examples of these collections include the Visual Resources Department of the Frances Loeb Library at Harvard University, the Visual Resources Collection at Binghamton University, and the Visual Resources Collection at Ithaca College. *Frances Loeb Library: Collections: Visual Resources*, HARV. U., http://www.gsd.harvard.edu/loeb_library/visual_resources/index.html (last visited Nov. 11, 2012); *Visual Resources Collection*, BINGHAMTON U., <http://vrc.binghamton.edu> (last visited Nov. 11, 2012); *Visual Resources Collection*, ITHACA C., <http://www.ithaca.edu/hs/vrc> (last visited Nov. 11, 2012).

3. Deborah Gerhardt & Madelyn Wessel, *Fair Use & Fairness on Campus*, 11 N.C. J. L. & TECH. 461, 485 (2010).

4. Visual resources professionals come from a variety of disciplines, but are commonly professional librarians with an art history background. Other titles for these professionals include image librarians, image managers, image media professionals, media specialists, slide librarians, visual resources librarians, and the like. For ease of discussion, this article will refer to such persons as “visual resources professionals.”

5. This is evident from the formation of the Intellectual Property Committee of the Visual Resources Association, the chief association for visual resources professionals. See *Intellectual Property Rights Committee*, VISUAL RESOURCES

In many respects, instructional practices have not changed since the days when glass plate slides were projected with lantern projectors: a surrogate image is captured; it is projected in the classroom during instruction; it is made available for student study purposes outside of the classroom; and it may be used once more for examination purposes. However, a change in a single variable, that the image is now digital rather than analog, can have profound copyright implications. For example, while it may have been considered fair use to provide a single copyrighted slide for student study purposes in a controlled environment, such as the slide library, providing a copyrighted digital image over a secure computer network no longer seems to fit within the fair use framework, especially because the image is replicated every time it is accessed. Despite unresolved copyright concerns, visual resources professionals attempted to stay current with the teaching needs of the faculty. As slide projectors became increasingly difficult to maintain, repair, or purchase, and slide film and film processing became a rarer proposition, many slide collections were blindly thrust into the digital age.

B. Types of Images Used

In order to understand the multifarious copyright concerns associated with visual resources collections, it is necessary to identify the types of images that comprise such collections. Generally, in order to teach art and design-related courses, faculty members require high-quality, accurate reproductions of creative works that can be projected for illustration on the classroom wall. They may also require additional images detailing specific aspects of a creative work, such as a magnification of a brushstroke technique, or a close-up of an architectural detail. Therefore, in both analog and digital collections, the best image “is the one that most accurately reproduces the work of art to be studied not the

ASS’N, <http://vraweb.org/organization/committees/ipr/index.html> (last visited Mar. 10, 2010).

most creative photographic interpretation of that work.”⁶ Whether the image is analog or digital, the interest of visual resources professionals “lies in maintaining the integrity of the original, underlying work.”⁷ Furthermore, “[e]lectronic images of art and architecture are essentially the same as analog images of art and architecture. The content is the same, only the format for delivery is different.”⁸

In both formats, such images present a complex set of copyright concerns. The proposed fair use guidelines for digital images that emerged from the Conference on Fair Use (CONFU)⁹ identified this concern, describing how

a digital image of a painting may have been scanned from a slide, which was copied from a published book that contained a printed reproduction of the work of art; this reproduction may have been made from a color transparency photographed directly from the original painting. There may be intellectual property rights in the original painting, and each additional stage of reproduction in this chain may involve another layer of rights. . . . The rights in images in each of these layers may be held by different rightsholders; obtaining rights to one does not automatically grant rights to use another, and therefore all must be considered when analyzing the rights connected with an image.¹⁰

6. Virginia M.G. Hall, *Fair Use or Foul Play? The Digital Debate for Visual Resources Collections*, 24 VISUAL RESOURCES ASS’N BULL. 33 (1997), available at <http://vraweb.org/resources/ipr/papers/fairfoul.html>.

7. *Id.*

8. *Id.*

9. See *infra* Part V.

10. BRUCE A. LEHMAN, THE CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE 34–35 (1998), available at <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf>.

While not every image will pose such complexity, the images within a visual resources collection, whether analog or digital, can be grouped into four main classes: 1) both the underlying work and the derivative image are in the public domain or are otherwise free from copyright restrictions; 2) the underlying work is in the public domain, but the derivative image has been copyrighted by the photographer or the holding institution or repository; 3) the underlying work is presently copyrighted, but the derivative image is not subject to copyright restrictions; 4) both the underlying work and the derivative image are subject to copyright. Of these, the first category poses little trouble for visual resources collections. The underlying work is in the public domain and the collection has secured a copyright-cleared reproduction of the work. At the opposite end of the spectrum, the fourth category poses the greatest challenge for those who wish to use images for teaching. For example, if an artwork is not in the public domain, and an institution holds the copyright to the work, the visual resources professional must grapple with both layers of copyright in order to use the image for instructional purposes. In addition to these baseline issues associated with copyright status, the copyright concerns with such images are further complicated by the means of acquiring and storing the images.

C. Acquisition

There are two main challenges for visual resources professionals when it comes to image acquisition: availability and quantity. When the copyright situation in visual resources collections is discussed with others within the higher education community, such as information technology staff, administrators, and institutional legal counsel, a common reaction is “why don’t you just purchase or license all the images we need?” While image purchases, and more recently digital image licensing, are an integral part of collection development, in practice they are but one aspect, and one which can only begin to address the needs of faculty.

In terms of availability, “the number of slides available commercially represents only a tiny percentage of the works of art

and architecture in the world. Scholarship in the discipline demands the use of images; lots of images.”¹¹ While an adequate image set is likely to be available for an art history survey course, perhaps even one keyed to the art history textbook an instructor is using, this is not so for upper-level and topical courses. As one veteran visual resources professional observed, “I may be one of only two curators in the world who needs an extensive selection of slides of the Early Christian fresco fragments found in the church of San Felice in Ceri, Italy.”¹² Thus, visual resources professionals frequently must acquire a range of images in accordance with faculty demand, which is guided by faculty interest and expertise, and frequently leads to quite esoteric requests.

A typical situation occurs when a professor decides to teach a course based on the work of a single artist. Hypothetically, there may be “only a few slides of this artist’s works available commercially” and “it is not unusual for a single publication to be the only source available for images that are needed.”¹³ The visual resources professional must then decide whether to reproduce most of the images from the single publication to augment the few images that are available commercially. The rights clearance process would involve determining the copyright status of the underlying works, any copyright claims the photographer of each derivative image may have, the rights of the publisher of the book which reproduced the images, and the rights of the institutions or repositories that house the artworks or the artist’s estate. While this may be a reasonable endeavor for a handful of images, the visual resources professional is then faced with the second issue: quantity.

“It is conservatively estimated that a semester long art history course may use two thousand slides. . . . At a mid-size institution where there are ten art history courses being taught each semester, professors will use forty thousand slides a year.”¹⁴ Another estimate found that “a typical art history lecture requires an

11. Hall, *supra* note 6.

12. *Id.*

13. *Id.*

14. *Id.*

average of 50 different images per class period”¹⁵ which may add up to 100 per week, or 1500 over the course of a semester. One visual resources professional describes the process of securing reproduction rights for 300 illustrations for a book covering a single artist: “It took two years. At that rate, even if we are adding only six thousand new slides a year, the average slide curator/librarian would need forty years to seek permissions for a single year’s acquisitions.”¹⁶ Furthermore, “[w]hile established copyright clearance mechanisms exist for use of other media such as text and music, there is no such entity for fine art images.”¹⁷ The lack of such a resource for this type of images may be attributable to the complex set of clearances required for such images, as discussed above,¹⁸ coupled with the limited audience for such a resource.

Due to the large number of images that are required to teach courses in art and design-related fields, and the obscurity of many of the works, visual resources professionals have typically engaged in three acquisition activities, each of which has a direct counterpart in digital practice. First, visual resources collections often contain slide sets that were purchased from commercial vendors. Presently, digital image licensing from many of the same vendors who formerly sold slide sets is available, and the use of such images is governed by licensing agreements.¹⁹ While the underlying work may or may not be in the public domain, until recently such vendors may have also claimed copyright to the surrogate image.²⁰ After *Bridgeman Art Library, Ltd. v. Corel*

15. Virginia M.G. Hall, Christine Steiner & Christine Sundt, *Image Archives and Fair Use*, VISUAL RESOURCES ASS’N, <http://vraweb.org/resources/ipr/papers/imagearchives.html> (last visited Mar. 10, 2010).

16. Hall, *supra* note 6.

17. *Id.*

18. See *supra* Part II.B.

19. For a thorough discussion of the legal issues surrounding licensing content for educational purposes, see LESLEY ELLEN HARRIS, *LICENSING DIGITAL CONTENT* (2002).

20. This assertion was knocked down for “slavish copies” of public domain works in *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999) (stating that “exact photographic copies of public domain

Corp., however, it would be difficult for an image vendor to assert copyright to surrogate images that are exact reproductions of public domain works. Therefore, a visual resources collection should be able to digitize slides which are “slavish copies” of works in the public domain.²¹ The implications for slide sets of creative works that are still under copyright protection are less clear.

Second, visual resources collections frequently contain original photographs or slides taken and donated by faculty members. This is particularly true for more obscure areas of study where faculty members have had to obtain images onsite for their own research, and have later donated their photographs to a visual resources collection. Today these donations come in the form of digital images. The derivative images are usually copyright-cleared because the faculty member generally transfers copyright (if any) to the visual resources collection upon donation, or should do so if best practices are followed.²² The underlying work, however, may pose the same issues as those images purchased from vendors.

Third, visual resources professionals acquire images through copystand photography, which “is the practice of making slides from pictures in books, exhibition catalogues, journals, etc.”²³ While “there is little documentation on the history of academic slide collections in this country, anecdotal evidence suggests that at least through the 1960s no one thought twice about the practice of copy photography.”²⁴ In addition to being “long standing,”²⁵ this practice appears to have been commonplace throughout academia. Indeed, visual resources professionals “seek to balance purchase of images and licensing agreements with the use of copy

works of art would not be copyrightable under United States law because they are not original.”).

21. See discussion *infra* Part VI.C.

22. See Visual Resources Association Committee on Intellectual Property Rights, *Image Collection Guidelines: The Acquisition and Use of Images in Non-Profit Educational Visual Resources Collections*, VISUAL RESOURCES ASS’N, § A(2), <http://www.vraweb.org/resources/ipr/guidelines.html> (last updated May 11, 2004).

23. Hall, *supra* note 6.

24. *Id.*

25. *Id.*

photography where images are not otherwise available.”²⁶ Today, copystand photography continues with images being scanned or photographed with a digital camera to reproduce the desired image. It is interesting to note “that the practice of copy photography was largely ignored for decades, until the advent of digital technology. Issues of wide dissemination, the specter of lost revenue and the interest in future product possibilities”²⁷ all contributed to the new attention visual resources collections began to receive. Although attention was not cast upon the practice of copystand photography until visual resources professionals ventured into the digital realm, the “bottom line is that until the issue of legality is resolved in the analog world of slides made from copy photography, we can not begin to address the fair use questions of digitizing those slides.”²⁸ Ironically, then, a discussion about the copyright issues surrounding the use of digital images in the classroom must begin in the dusty corners of the slide room.

D. Storage & Use

In addition to the layered copyright structure and the various means of image acquisition, the storage and use of images further complicates the copyright predicament posed by visual resources collections. Traditionally, slides were cataloged and filed in slide drawers in facilities that were accessible to the institutional community. Similarly today, digital images are organized in image databases that generally require a login for access. In both cases, best practice dictates that images be maintained in a contained environment. In terms of digital image databases, some are limited to purely internal access, while others offer limited public access over the Internet.²⁹ Digital images are usually cataloged and indexed, and users can search the database by typical fields, such as artist name, title, medium, and the like.

26. *Id.*

27. *Id.*

28. *Id.*

29. See, e.g., *Visual Resources Center*, WILLIAMS C. ART DEP'T, <http://drm.williams.edu/vrc> (last visited Mar. 10, 2010).

While descriptive information as to holdings is displayed, in many cases thumbnail images of search results are also displayed; this is comparable to performing a search using Google Image Search, except that the results will be limited to the collection's holdings. In some cases, the thumbnail image will provide access to a full-sized image when clicked. Access to the full-sized image is usually limited to community users through an intermediary login page, unless a collection consists of purely public domain or otherwise copyright-cleared images.³⁰

It is at the point of image use that the real differences between analog and digital practice emerge. In both cases, the major use of educational images will be the projection of images, whether analog or digital, for in-class, face-to-face instruction. Such a use probably poses the least challenging copyright concerns.³¹ In the analog context, slides displayed in the classroom or viewed individually by students appeared to pose less of a threat to copyright owners because fair use principles, as well as the direct classroom instruction provisions in 17 U.S.C. § 110(1), seemed to support these educational uses.³² In the digital environment, however, digital images must be stored on any number of intermediary devices before being displayed to students in the classroom. Faculty members must carry the images on thumb drives, laptops, and the like, or access them from an institutional server. While the end use is identical, namely projecting images on the classroom wall for instruction, the means to accomplish this may implicate new copyright concerns.

The second use is that of students independently reviewing images that have been selected by their professor. The independent study of images by students was traditionally accomplished in slide libraries by placing a certain set of slides on reserve for students to review individually. Today, digital image sets are arranged in a similar fashion, however, review may be accomplished remotely through a web-based course content site,

30. See, e.g., *Art Images for College Teaching*, U. OF MICH., <http://quod.lib.umich.edu/a/aict?g=art-ic;page=index> (last visited Mar. 10, 2010).

31. See discussion *infra* Part VI.B.

32. See generally Gerhardt & Wessel, *supra* note 3.

such as *Blackboard*,³³ or through a password-protected website. While the activity is the same—individual student study—the digital version involves digitally distributing the selected images, albeit in a secure environment. In addition to distributing the images, the technology necessarily produces endless intermediate replications of the images.

The final use of images occurs for examination purposes, which is dictated by faculty instructional style. With analog images, faculty members tended to project slides on the wall for examination purposes. Examination also took the form of photocopied images on exam sheets. Similarly, examination may be accomplished through the projection of digital images or through the reproduction of images onto an examination sheet. In the digital realm, however, unique testing technologies are available which allow computer-based examination of students through the onscreen display of images.

A final consideration that appears within the digital context is a hybrid of the classroom use and the student study use, namely the use of digital images in distance learning environments. In this case, the instruction is no longer “face-to-face” and a transmission occurs when the images are sent to the student’s remote computer. The transmission may also be asynchronous if the distance course is not instructed in real-time.

III. THE STATUTORY LANDSCAPE

A. Copyright Generally

Article I, Section 8 of the United States Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁴ Congress has enacted and amended extensive copyright legislation to this end, “beginning with the first copyright statute in 1790, to the present statutory structure

33. BLACKBOARD, <http://www.blackboard.com> (last visited Mar. 10, 2010).

34. U.S. CONST. art. I, § 8, cl. 8.

embodied in the Copyright Act of 1976.”³⁵ The constitutional underpinnings are important in the copyright analysis and frequently figure into copyright judicial decisions. Indeed, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court stated that the “primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”³⁶ Similarly, the Court has stated that the “copyright law, like the patent statute, makes reward to the owner a secondary consideration.”³⁷ Following suit, in the United States Patent and Trademark Office (PTO) *General Guide to the Copyright Act of 1976*, it is stated that “the primary purpose of copyright legislation is to foster the creation and dissemination of intellectual works for the public welfare.”³⁸

B. The Copyright Act of 1976

Under the Copyright Act of 1976 (“the Copyright Act”), “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”³⁹ Therefore, the dual requirements of *originality* and *fixation* must be met if a work is to qualify for copyright protection.⁴⁰ The originality requirement “means only that the work was independently created by the

35. SHELDON W. HALPERN, CRAIG ALLEN NARD & KENNETH L. PORT, *FUNDAMENTALS OF UNITED STATES INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENT, TRADEMARK* 1–2 (3d ed. 2011). The Copyright Act of 1976 is codified in 17 U.S.C. §§ 101–810, 1001–1101.

36. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (citing U.S. CONST. art. I, § 8, cl. 8; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1985); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

37. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

38. MARYBETH PETERS, *GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976* 1.1 (1977), available at <http://www.copyright.gov/reports/guide-to-copyright.pdf>.

39. 17 U.S.C. § 102 (2006).

40. *Id.*

author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”⁴¹ Copyright protection attaches at the moment of fixation. Under current copyright law, a copyright holder is not required to register his or her work,⁴² nor denote a work’s copyright status with any symbol,⁴³ although “[a]ppropriate notice of copyright is still advisable and the better practice.”⁴⁴ Additionally, a copyrighted work must be registered with the Copyright Office prior to the commencement of a copyright infringement suit.⁴⁵

C. The Rights of the Copyright Holder

Ownership of a valid copyright grants the copyright holder a bundle of exclusive rights to the work under 17 U.S.C. § 106. These rights include: the right “to reproduce the copyrighted work in copies” (the reproduction right);⁴⁶ the right “to prepare derivative works based upon the copyrighted work”;⁴⁷ the right “to distribute copies . . . of the copyrighted work” (the distribution right);⁴⁸ the right “to perform . . . [or] to display the copyrighted work publicly” (the performance and display rights);⁴⁹ and for audio recordings, the right “to perform the copyrighted work publicly by means of a digital audio transmission.”⁵⁰ Copyright infringement occurs when a person “violates any of the exclusive rights of the copyright owner.”⁵¹

Among these exclusive rights, the practices of the visual resources field implicate the copyright holder’s reproduction, distribution, and display rights. There are various limitations to

41. *Feist Publ’ns*, 499 U.S. at 345.

42. 17 U.S.C. § 408(a) (2006).

43. *Id.* § 401.

44. HALPERN, NARD & PORT, *supra* note 35, at 44.

45. 17 U.S.C. § 412 (2006).

46. *Id.* § 106(1).

47. *Id.* § 106(2).

48. *Id.* § 106(3).

49. *Id.* § 106(4)–(5).

50. *Id.* § 106(6).

51. 17 U.S.C. § 501 (2006).

these exclusive rights as codified in 17 U.S.C. §§ 107–112.⁵² These limitations must be examined to evaluate whether the activities of a visual resources collection fall within the limitations to the exclusive rights of the copyright holder, which would mitigate a finding of copyright infringement.

D. Exceptions for Libraries

17 U.S.C. § 108 announces a complex and intertwined set of limitations on the exclusive rights of copyright holders in the context of “[r]eproduction by libraries and archives.”⁵³ These exceptions apply only to libraries and archives which are “open to the public”⁵⁴ or are available to persons not affiliated with the institution who are “doing research in a specialized field.”⁵⁵ Most visual resources collections at colleges and universities should fulfill these criteria.

The first exception under subsection 108(a) permits the reproduction and distribution of “no more than one copy or phonorecord of a work” as long as it is “made without any purpose of direct or indirect commercial advantage”⁵⁶ and some form of copyright notice is included with the reproduction.⁵⁷ Under the other exceptions in subsections 108(b) and 108(c), reproduction and distribution of up to three copies of a work can be made for preservation and replacement purposes if the copies are “not made available to the public . . . outside the premises of the library or archives.”⁵⁸ These exceptions are most relevant to archival holdings.

Section 108(d) allows the reproduction and distribution “of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work” only for “private study,

52. *Id.* § 107–12.

53. *Id.* § 108.

54. *Id.* § 108(a)(2)(i).

55. *Id.* § 108(a)(2)(ii).

56. *Id.* § 108(a)(1).

57. 17 U.S.C. § 108(a)(3) (2006).

58. *Id.* § 108(b)–(c).

scholarship, or research,” and if a copyright warning is prominently displayed.⁵⁹ A similar provision is made for interlibrary loan purposes if “a copy or phonorecord of the copyrighted work cannot be obtained at a fair price.”⁶⁰ Finally, while section 108(i) states that the exceptions under this section “do not apply to a . . . a pictorial, graphic or sculptural work,” it further states that “with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e)[,]” “no such limitation shall apply.”⁶¹

E. Exceptions for Teaching

17 U.S.C. § 110 articulates exceptions to the exclusive rights of copyright holders in the context of education. Subsection 110(1) permits the “display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction” so long as the copy was “lawfully made.”⁶² Therefore, if a copy of a copyrighted image was procured in a lawful manner, it may be used (i.e., “displayed”) in face-to-face teaching activities without infringing upon the copyright holder’s display right.

Furthermore, under 17 U.S.C. § 110(2), also known as the Technology Harmonization and Education Act (TEACH Act), “display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission” is permitted if the copy was: 1) lawfully made; 2) the display “is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution”; 3) the “display is directly related and of material assistance to the teaching content of the transmission”; 4) the transmission is limited to “students officially

59. *Id.* § 108(d).

60. *Id.* § 108(e).

61. *Id.* § 108(i).

62. *Id.* § 110(1).

enrolled in the course”; and 5) “the transmitting body or institution” has copyright policies in place which are made known, along with other “informational materials . . . that accurately describe, and promote compliance with, the laws of the United States relating to copyright,” to “faculty, students, and relevant staff members.”⁶³ Finally, the institution must ensure that “technological measures” are in place for digital transmissions to prevent “retention of the work . . . for longer than the class session” and “unauthorized further dissemination of the work.”⁶⁴

F. Fair Use

The fair use doctrine under 17 U.S.C. § 107 provides a further limitation on the exclusive rights of the copyright holder. The fair use doctrine states that the use of copyrighted materials “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”⁶⁵ However, to determine whether a use is fair, four factors must be considered:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶⁶

Fair use is an equitable doctrine and the defendant bears the burden of proving that his or her use was fair.⁶⁷ Thus, fair use is an affirmative defense to an activity that would otherwise constitute infringement upon the copyright holder’s exclusive rights, and

63. 17 U.S.C. § 110(2) (2006).

64. *Id.*

65. *Id.* § 107.

66. *Id.*

67. *Harper & Row*, 471 U.S. at 532.

“[t]his affirmative defense represents the most important—and amorphous—limitation on the otherwise extraordinarily broad rights granted to copyright under section 106 of the Act.”⁶⁸ Unfortunately, the “fair-use doctrine of American copyright law has been derided as among the most hopelessly vague of legal standards, requiring complex and often subjective interpretation.”⁶⁹ Due to this ambiguity, and the requirement of a case-by-case analysis, “[f]air use does not assist parties . . . in making ex ante determinations whether or not to copy, and if so, how much. It is a highly fact-specific defense.”⁷⁰ For this reason,

[w]hile the doctrine’s attention to context has many salutary attributes, it is so case-specific that it offers precious little guidance about its scope to artists, educators, journalists, Internet users, and others who require use of another’s copyrighted expression in order to communicate effectively. The conventional wisdom is that this ex ante uncertainty is simply the price that policymakers must accept for choosing a standard over a rule.⁷¹

To determine whether a use in the context of visual resources collections would be considered fair, an examination of the four fair use factors as interpreted by case law is necessary. Furthermore, the “determination of whether or not some activity may or may not be fair use is actually akin to a prediction of how a judge might decide the same question, based on limited precedent and wide variations in possible interpretations.”⁷² However, this “task is not to be simplified with bright-line rules, for the statute,

68. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 551 (2008).

69. Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair Use Guidelines*, 62 OHIO ST. L.J. 599, 605 (2001).

70. Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1926 n.226 (1990).

71. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1091 (2007).

72. Crews, *supra* note 69, at 606.

like the doctrine it recognizes, calls for case-by-case analysis.”⁷³ When performing this analysis, moreover, “courts often acknowledged that the four-factor test should not be applied formulaically; as one court put it, the test does not ‘constitute an algorithm that enables decisions to be ground out mechanically.’”⁷⁴

IV. A COLLAGE OF CASE LAW

Despite “multiple references to education, there is a remarkable paucity of judicial decisions considering fair use by educational institutions themselves, as opposed to third parties such as commercial copy centers.”⁷⁵ However, “fair use is intrinsically aligned with the notion that education deserves preferential treatment and should not be unduly inhibited.”⁷⁶ This is evident from the specific references to academic activities in the fair use section of the Copyright Act, such as “teaching (including multiple copies for classroom use), scholarship, [and] research.”⁷⁷ Even with this preferential treatment, in “the absence of recent decisions applying fair use in the educational context, a strong current of fair use pessimism has developed on many college campuses.”⁷⁸ As one attorney has noted, however, this pessimism is unfounded when fair use decisions are analyzed.⁷⁹ A closer look at the relevant decisions will assist in the fair use analysis of the activities of visual resources collections.

The first fair use factor, “the purpose and character of the use,”⁸⁰ favors “nonprofit educational purposes” over uses “of a

73. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citing *Harper & Row*, 471 U.S. at 560).

74. Beebe, *supra* note 68, at 561 (quoting *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003)).

75. Jonathan Band, *Educational Fair Use Today*, ASS’N OF RES. LIBR., Dec. 2007, at 2–3, available at <http://www.publicaccessstoresearch.com/bm~doc/educationalfairusetoday.pdf>.

76. KENNETH D. CREWS, *COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION* 23 (1993).

77. 17 U.S.C. § 107 (2006).

78. Band, *supra* note 75, at 2.

79. *Id.*

80. 17 U.S.C. § 107(1) (2006).

commercial nature.”⁸¹ The “central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁸² In other words, it asks “whether and to what extent the new work is ‘transformative.’”⁸³ A use “is considered transformative only where a defendant changes a plaintiff’s copyrighted work or uses the plaintiff’s copyrighted work in a different context such that the plaintiff’s work is transformed into a new creation.”⁸⁴

In a distinct line of cases, the use of thumbnails in an Internet-based search engine and index environment has been found to be “highly transformative.”⁸⁵ In *Kelly v. Arriba Soft Corp.*, the court concluded that Arriba’s use of thumbnails was transformative because the “use of the images serve[d] a different function than Kelly’s use—improving access to information on the [I]nternet versus artistic expression.”⁸⁶ Similarly, in *Perfect 10, Inc. v. Amazon.com, Inc.*, the court found that

[a]lthough an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. Just as a “parody has an obvious claim to transformative value’ because ‘it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one,” a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool.⁸⁷

81. *Id.*

82. *Campbell*, 510 U.S. at 578–79 (citations omitted).

83. *Id.*

84. *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769, 778 (9th Cir. 2006).

85. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721 (9th Cir. 2007).

86. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003).

87. *Perfect 10*, 487 F.3d at 721.

Although these cases extend only to the use of thumbnail images in an Internet-based search engine, it can be argued that the use of images in the classroom environment differs substantially from the original use of the images as a form of artistic expression. Such a use is therefore transformative and, like the Internet search engine, provides an important societal benefit, namely that of education. If a strong enough showing that an educational use is “highly transformative” can be made, this will weigh in favor of a finding of fair use.

Additionally, while a “transformative use is not absolutely necessary for a finding of fair use, . . . the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁸⁸ Put another way, if “a court finds that the defendant’s use is ‘transformative’ or ‘noncommercial’ under factor one, and that factor one therefore favors the defendant, a court will also likely find that the defendant’s use, precisely because it is transformative or noncommercial, will not adversely affect the market for the plaintiff’s work.”⁸⁹ For this reason, the “expected result is that factor four will also favor the defendant.”⁹⁰ As an empirical study of fair use decisions has found, “outcomes under [the first] factor correlated very strongly with the outcome of the overall fair use test.”⁹¹

The second fair use factor is “the nature of the copyrighted work.”⁹² This factor “requires an examination of the qualities and attributes of the copyrighted work” being used.⁹³ Generally, this factor favors a finding of fair use for works of a nonfiction nature, or works that are highly fact-based as opposed to creative.⁹⁴ Therefore, “the second factor will militate against a finding of fair use where the copyrighted work is creative art or literary fiction, or

88. *Campbell*, 510 U.S. at 579.

89. Beebe, *supra* note 68, at 583.

90. *Id.*

91. *Id.* at 597.

92. 17 U.S.C. § 107(2) (2006).

93. KENNETH D. CREWS, *COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS: CREATIVE STRATEGIES AND PRACTICAL SOLUTIONS* 46 (2d ed. 2006).

94. *Id.*

other forms of creative expression, as opposed to factual, historical data or news reporting.”⁹⁵ Nevertheless, in at least one case concerning images that were “creative works,” the court found that “the second factor ha[d] limited weight in our analysis because the purpose of [the] use was to emphasize the images’ historical rather than creative value.”⁹⁶ Similarly, the purpose of the use of images in education is to emphasize their didactic value, rather than their creative value. Thus, while the creative nature of the copyrighted work will disfavor a finding of fair use under the second factor, the transformative nature of the use under the first factor will tip the balance in the other direction if the use is found to be highly transformative. As one author described it, “this factor serves as a thumb on the scale in favor of the copyright owner because most works are deemed creative.”⁹⁷

The third factor measures the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.”⁹⁸ This inquiry is “both quantitative and qualitative; a quantitatively small amount may nevertheless be sufficient to encapsulate the copyrighted work and qualitatively be quite substantial.”⁹⁹ While the use of an image generally requires the use of the entire work, thus disfavoring a finding of fair use, “courts have concluded that such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image.”¹⁰⁰ This is particularly true of an image required for educational purposes, as the entire image is necessary in order to teach. Put another way, “the extent to which the defendant has used the material in a ‘transformative’ manner can

95. HALPERN, NARD & PORT, *supra* note 35, at 129.

96. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

97. Carroll, *supra* note 71, at 1103.

98. 17 U.S.C. § 107(3) (2006).

99. HALPERN, NARD & PORT, *supra* note 35, at 129 (citing *Campbell*, 510 U.S. at 587).

100. *Bill Graham Archives*, 448 F.3d at 613. *See also Kelly*, 336 F.3d at 821 (concluding that images used for a search engine database needed to be copied in their entirety in order to be recognizable); *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000) (concluding that copying any less than the entire image would have made the image useless to the story).

have a significant bearing upon whether the taking is to be considered excessive; a transformative use can support a qualitatively greater taking than can a non-transformative use.”¹⁰¹

The final fair use factor examines “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁰² While once a determinative factor, the “Supreme Court has recently retreated from its earlier cases suggesting that the fourth statutory factor is the most important element of fair use, recognizing instead that ‘all [factors] are to be explored, and the results weighed together, in light of the purposes of copyright.’”¹⁰³ Nonetheless, the inquiry under the final factor “concerns the impact upon both the existing market for the plaintiff’s work and potential markets for that work itself as well as for derivative works.”¹⁰⁴ It is therefore “concerned with secondary uses that, by offering a substitute for the original, usurp a market that properly belongs to the copyright holder.”¹⁰⁵

The final factor is probably the most problematic for analysis in visual resources collections as it is difficult to pinpoint the potential markets that the educational use may affect: the market for the original artwork, the market for the book that reproduced the artwork from which a surrogate image was produced, the market for the work of the photographer who created the surrogate image, etc. It is difficult to envision how the use of educational images would interfere with the sales generated from artworks. Additionally, “a copyright holder cannot prevent others from entering fair use markets merely ‘by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.’”¹⁰⁶ In other words,

101. HALPERN, NARD & PORT, *supra* note 35, at 129 (citing *Campbell*, 510 U.S. at 587–88).

102. 17 U.S.C. § 107(4) (2006).

103. *Blanch v. Koons*, 467 F.3d 244, 258 n.8 (2d Cir. 2006) (quoting *Harper & Row*, 471 U.S. at 566; *Campbell*, 510 U.S. at 578).

104. HALPERN, NARD & PORT, *supra* note 35, at 129 (citing *Harper & Row*, 471 U.S. at 556).

105. *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d Cir. 1998).

106. *Bill Graham Archives*, 448 F.3d at 614–15 (2d Cir. 2006) (citing *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 146 n.11 (2d. Cir. 1998)).

“copyright owners may not preempt exploitation of transformative markets.”¹⁰⁷ Thus, if the use of an image in an educational setting is deemed to be fair, a museum, artist’s estate, or the like cannot preempt this fair use by creating its own educational uses of works for which it holds the copyright. Furthermore, when a use “falls within a transformative market,” the defendant “does not suffer market harm due to the loss of license fees.”¹⁰⁸ In terms of the publishers of books containing art images, moreover, one visual resources professional has noted that “[t]he slides are not in fact a substitute for a marketed product, as repeated use of photocopies in a classroom might be seen to substitute for the sale of a text book. The images are used independently with no direct reference to the source from which they were taken.”¹⁰⁹

V. THE GRIDWORK OF GUIDELINES

Out of the uncertainty surrounding the fair use doctrine, an entourage of myths has emerged. These include assertions that any educational purpose will lead to a fair use, as well as arbitrary quantitative guidelines, such as the assumption that using less than ten percent of a work will always be a fair use. Unfortunately, in the absence of clear statutory language, and with the perplexing outcomes of various fair use cases, it is difficult to dispel such myths. It is equally challenging to resolve for the lay audience the outcome of one court which “ruled that reprinting three hundred words from an earlier work was too much, while another case allowed several thousand words.”¹¹⁰ However, such “decisions are not inconsistent; they reveal that fair use depends on specific circumstances of each use.”¹¹¹

Not surprisingly, in an attempt to elucidate the principles of fair use, several sets of guidelines have emerged over the three decades

107. *Castle Rock*, 150 F.3d at 146 n.11.

108. *Bill Graham Archives*, 448 F.3d at 614–15 (citing *Castle Rock*, 150 F.3d at 146 n.11).

109. Hall, *supra* note 6.

110. Crews, *supra* note 69, at 695 (comparing *Harper & Row*, 471 U.S. at 569 (using 300 words exceeded fair use) with *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1265 (2d Cir. 1986) (using 7000 words was within fair use)).

111. Crews, *supra* note 69, at 695.

since the Copyright Act was enacted. These include the Classroom Guidelines (1976), the Music Guidelines (1976), the Off-Air Videotaping Guidelines (1981), the National Commission on New Technological Uses of Copyrighted Works Guidelines (1979), and the Conference on Fair Use (CONFU) Guidelines (1994–1998).¹¹² Unfortunately, these guidelines have fueled fair use uncertainty because these private interpretations of fair use found in the guidelines have worked their way into discussions of fair use in place of legislative or judicial interpretations.

The guidelines reflect the views of various interested parties, and while “copyright owners have consistently misstated the scope of the fair use privilege in a wide variety of fora . . . , certain academics have overstated the fragility of fair use in an effort to advance their theories of copyright law or their legislative proposals.”¹¹³ Nevertheless, the guidelines still carry weight in the fair use discussion because “the process of developing the guidelines gives them the appearance of a normative quality, while the portrayal of the guidelines as formal standards sanctioned by authoritative structures gives them the appearance of positive law.”¹¹⁴ However, such “qualities are merely illusory, and consequently the guidelines have had a seriously detrimental effect. They interfere with an actual understanding of the law and erode confidence in the law as created by Congress and the courts.”¹¹⁵ Despite this “weak platform,” guidelines “continue to have appeal in the marketplace simply because the unsettled nature of fair use leaves many individuals uncomfortable with applying the law.”¹¹⁶ Nonetheless, it is important to note that “Congress never has adopted any of the guidelines into legislation, and no court has accepted them as a standard of fair use applicable to any situation.”¹¹⁷

112. For an extensive, rigorous examination of the fair use guidelines and their influence on copyright law, *see* Crews, *supra* note 69.

113. Band, *supra* note 75, at 2.

114. Crews, *supra* note 69, at 601.

115. *Id.*

116. *Id.* at 611.

117. *Id.* at 692.

In addition to the fact that fair use guidelines are not law, they may in fact greatly diverge from the law of fair use. Indeed, “most of the guidelines that purport to interpret fair use in fact bear little credible relationship to the law.”¹¹⁸ In terms of divergence from the law, the Classroom Guidelines are

the most salient case on point. They seek to quantify a law that Congress took pains to keep flexible. They also introduce variables in the fair-use equation that appear nowhere in the statute. Specifically, fair use under the statute depends on the four factors of purpose, nature, amount, and effect. The guidelines, however, make fair use dependent on brevity, spontaneity, and cumulative effect. By focusing on those variables, rather than the statutory four factors, guidelines depart abruptly from the law itself and may in fact make decisions based upon standards that are legally less sound.¹¹⁹

For these reasons, the guidelines may even have “a subversive force on the law, as they purport to displace the congressionally sanctioned factors with a privately negotiated alternative.”¹²⁰ After an analysis of one section of the Classroom Guidelines, moreover, a court “ultimately ruled that those guidelines, in that one respect, were not consistent with fair-use law.”¹²¹ In the end, guidelines “that attempt to isolate and identify a precise measure of fair use for many different situations are overtly rejecting the fundamental flexibility of the law. . . . They attempt to find and hit the bull’s eye of a moving target.”¹²²

In addition to their misstatement of the law, or lack of reliance on fair use law in the first place, the existing guidelines are difficult to apply in visual resources collections. The guidelines which have received the most support, the Classroom Guidelines,

118. *Id.* at 605.

119. *Id.* at 665.

120. Crews, *supra* note 69, at 665.

121. *Id.* at 641.

122. *Id.* at 697.

were intended “for photocopying of text” and “simply do not provide a usable paradigm for the slide curator/librarian.”¹²³ As discussed, the layers of copyright associated with each image in a collection present a large number of variables.¹²⁴ While the end uses of educational images are fairly fixed, the acquisition practices diverge widely. In general, guidelines seek to set parameters for a fixed number of situations, but elaborating principles for every copyright situation faced by the visual resources professional would be an impossible task. This may explain the failure of the CONFU Guidelines that were developed for digital images and “received nearly no support.”¹²⁵

CONFU “was an effort to bring diverse groups together to reach a mutual resolution of major issues of fair use. The outcome of the effort, by contrast, revealed deep division in the participants’ understanding of fair use.”¹²⁶ For this reason, CONFU was largely a failure. Five sets of guidelines emerged out of CONFU based on different fair use scenarios, all within the educational sphere. These included those for electronic reserves systems, for digital images, for distance learning, for interlibrary loans, and for educational multimedia.¹²⁷ The Digital Images Guidelines have been described as

perhaps the most awkward of all the guidelines to emerge from CONFU. They are set forth in a lengthy document that seeks at its core to articulate when a library or educational institution may make a digital version of a photograph or other image and make it available for teaching and research. While this subject may appear to be relatively focused in its scope, the legal issues actually became

123. Hall, *supra* note 6.

124. See *supra* Part II.B.

125. Crews, *supra* note 69, at 628.

126. *Id.*

127. CREWS, *supra* note 93, at 61–62.

extraordinarily intertwined. The result is a complex and convoluted set of guidelines.¹²⁸

These guidelines, however, certainly reflect the unique and overwhelming copyright situation posed by visual resources collections. In an attempt to pinpoint all of the copyright factors associated with both analog and digital visual resources management, the CONFU participants developed a document with language that “is convoluted, verbose, and obscure.”¹²⁹ For example, “the measure of fair use is repeatedly hedged with admonitions about the need to secure permission and to keep records of all efforts. If some specific activity is outside an elaborately sanctioned provision, the guidelines repeatedly refer users back to ‘the four-factor fair use analysis’ under the law.”¹³⁰ Like the other guidelines, instead of building from the law itself, specifically the four fair use factors and the exceptions in 17 U.S.C. §§ 108 and 110, the guidelines attempt to create something new, more restrictive, and all-inclusive. The resultant guidelines “were widely held by Visual Resources professionals to be overly restrictive and generally unworkable.”¹³¹

One of the more prevalent reasons “why these CONFU guidelines won’t work for the constituency for whom they are intended has to do with the issue of copy photography.”¹³² In his *Position Statement on the CONFU Guidelines for Digital Images*, the then-President of the Visual Resources Association wrote that the “methods described for clearing these rights are not just inconvenient, but completely unworkable.”¹³³ He described how the visual resources profession “is charged with providing educators with surrogate images. Although it is our practice to document the sources for all the images we use, copyright claims to surrogate images often extend beyond such documentation, and

128. Crews, *supra* note 69, at 634.

129. *Id.* at 635.

130. *Id.*

131. Hall, *supra* note 6.

132. *Id.*

133. Joseph Romano, *Position Statement on the CONFU Guidelines for Digital Images*, VISUAL RESOURCES ASS’N (Nov. 22, 1996), <http://vraweb.org/resources/ipr/position/confu.html>.

so are ultimately beyond our control. There is nothing resembling a ‘copyright clearance center’ for images.”¹³⁴ He also observed that “none of the other guidelines presume to place a deadline on usage of materials or instruct the librarian (or visual resources professional) as to the procedures to be followed to obtain permissions.”¹³⁵

In sum, the various guidelines for fair use are of little assistance in the analysis of the copyright issues surrounding visual resources collections. In fact, the various guidelines may actually hamper the legal analysis. In lieu of reliance upon guidelines, “Congress can amend the statute, and courts can interpret it, but private parties acting outside those channels can only influence perception of the law.”¹³⁶ Therefore, the analysis of copyright issues in the visual resources context must stem from the law itself. Most importantly, fair use “guidelines should be rooted explicitly in fair-use law. Future guidelines should begin with the framework of the factors in the statute and address their meaning for the application at issue.”¹³⁷

VI. LEGAL CONCLUSIONS: AN INVERTED APPROACH

Because the various fair use guidelines are difficult to apply in visual resources collections, coupled with the fact that such guidelines are not “built on the four factors that Congress and the courts have laid down as the actual measure of lawful activity,”¹³⁸ visual resources collections should move away from the concepts and interpretations of fair use that evolved from the guidelines. This includes concepts of quantitative limitations and the “brevity, spontaneity, and cumulative effect” analysis under the Classroom Guidelines, which were developed for, and are only useful for, the reproduction of textual materials in the classroom setting. Instead, the traditional approach to fair use must be inverted.

134. *Id.*

135. *Id.*

136. Crews, *supra* note 69, at 700.

137. *Id.* at 696.

138. *Id.* at 622.

As discussed, the traditional approach seeks to define what constitutes fair use in various situations.¹³⁹ By attempting to delineate the extent of acceptable fair uses, such guidance tries to document all situations where copyright issues might arise and dictate an acceptable approach to each situation. In the visual resources context, because each image poses a unique challenge, there is no way to identify and describe all possible copyright combinations and permutations, and then proceed to anticipate which of these uses would be fair. Indeed, it was just such an attempt that led to the “convoluted, verbose, and obscure” guidelines developed for digital images at CONFU.¹⁴⁰ As the Supreme Court has announced in relation to the fair use analysis, the “task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”¹⁴¹

Instead of concentrating on attempts to define fair use, visual resources collections should employ an inverted approach and attempt to pinpoint what is clearly *not* fair use. Unlike the guidelines, this analysis should derive from the law itself: collections should start by determining whether any of their activities fall within the library exceptions under 17 U.S.C. § 108 and the teaching exceptions under 17 U.S.C. § 110. For all other activities outside of the scope of those exceptions, activities that are clearly *not* fair use should be identified. Unlike the conventional guidelines, this inverted approach to fair use should be built upon the four fair use factors themselves, as interpreted by the relevant case law.

A. Application of Exceptions for Libraries Under 17 U.S.C. § 108

17 U.S.C. § 108(a) allows libraries “to reproduce no more than one copy or phonorecord of a work . . . or to distribute such copy or phonorecord,” as long as there is no “direct or indirect commercial advantage,” the library qualifies as a “library or archives” as defined in subsection 108(a)(2), and “a notice of

139. *See supra* Part V.

140. Crews, *supra* note 69, at 635.

141. *Campbell*, 510 U.S. at 577 (citing *Harper & Row*, 471 U.S. at 560).

copyright” appears on the copy.¹⁴² Because this section contemplates the reproduction of works held in the collection of a library or archives, it has limited application in the visual resources context because most of the creative works being reproduced are not owned by the visual resources collection itself, although the visual resources collection may own the source (i.e., the book) from which the image is taken. Furthermore, this subsection does not speak to whether such a reproduction, once made, can be retained indefinitely. Additionally, if the image to be reproduced is available for purchase in a digital format, such as from a textbook publisher that allows libraries to purchase companion images to textbooks, the requirement that “the reproduction or distribution is made without any purpose of direct or indirect commercial advantage”¹⁴³ may be challenged.

Subsections 108(b) and (c) probably have no application in visual resources collections because they pertain to reproductions made specifically for preservation or replacement purposes, with subsection 108(b) relating to unpublished works and subsection 108(c) relating to published works. These subsections, however, will be relevant to situations where a visual resources collection owns certain original works of arts, such as prints, lithographs, or photographs, and must make reproductions for preservation purposes. Some visual resources collections may own a limited number of original works, including the works of alumni, faculty members, and students. While such situations will arise infrequently, these subsections may be useful in this limited context.

17 U.S.C. § 108(d) also permits the reproduction and distribution “of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work” only for “private study, scholarship, or research” and if a copyright warning is prominently displayed.¹⁴⁴ A similar provision is made for interlibrary loan purposes under subsection 108(e) if “a copy or phonorecord of the copyrighted work cannot be obtained at a fair

142. 17 U.S.C. § 108(a) (2006).

143. *Id.*

144. *Id.* § 108(d).

price.”¹⁴⁵ Subsection 108(d) probably embraces the limited reproduction of materials from sources within a visual resources collection, such as art history textbooks or journals, made for an individual student or faculty member for his or her own “private study, scholarship, or research” purposes.¹⁴⁶ While it is evident that these allowances contemplate text-based materials, 17 U.S.C. § 108(i) also specifies that

[t]he rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, . . . except that no such limitation shall apply with respect to . . . pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed.¹⁴⁷

Despite this language, the limitations to the copyright holder’s exclusive rights under 17 U.S.C. § 108 probably have limited application in visual resources collections because they pertain mainly to textual works held within the collection of a library or archives. However, it is important for the visual resources professional to be aware of these exceptions in the event that the limited circumstances to which they pertain should arise. Within the visual resources setting, such circumstances may arise from individual reproduction requests from faculty members and students, as well as the preservation or replacement of original works that are contained within the visual resources collection’s own holdings.

B. Application of Exceptions for Teaching Under 17 U.S.C. § 110

17 U.S.C. § 110 permits certain uses of images by instructors. This section enables instructors to use copyrighted images (as a “display of a work”) “in the course of face-to-face teaching

145. *Id.* § 108(e).

146. *Id.* § 108(d)(1).

147. *Id.* § 108(i).

activities.”¹⁴⁸ Therefore, the in-classroom use of images in the course of face-to-face teaching activities does not pose much concern for visual resources collections. The TEACH Act, furthermore, extends this display exception to distance learning situations; the “display of a work,” however, must be “in an amount comparable to that which is typically displayed in the course of a live classroom session.”¹⁴⁹ This provision should also allow for the remote viewing of images by students “officially enrolled in the course” for study purposes if the technological requirements stipulated in 17 U.S.C. § 110(2)(D) are fulfilled by the institution. Visual resources collections, therefore, should look to the teaching provisions and ensure that the uses of images employed by instructors conform to these parameters.

C. Application of Fair Use Doctrine Under 17 U.S.C. § 107

Because the exceptions for libraries and archives under 17 U.S.C. § 108 have limited application in visual resources collections, and the teaching exceptions under 17 U.S.C. § 110 only relate to the acceptable end uses of lawfully acquired images, most of the activities of visual resources collections must be analyzed under the fair use doctrine of 17 U.S.C. § 107. Hence, visual resources collections must look to the fair use doctrine to guide their activities, most notably copystand photography and other methods of acquisition. As noted above, the

use of visual images poses distinct challenges for applying fair use. The use will most likely require the entire work, a fact that most often weighs against fair use. A photograph may also be a highly creative work, which also generally weighs against fair use. Moreover, a single photograph may involve layers of legal claims. The photographer may hold the copyright, but the photograph may capture the image of a painting or other copyrighted work, or of a sign that has trademark protection, or

148. 17 U.S.C. § 110(1) (2006).

149. *Id.* § 110(2).

of a person who has rights of privacy or publicity. The image may be from a book or slide collection, to which a publisher other party [sic] holds a compilation copyright. These circumstances give rights to multiple claimants with respect to one visual image.¹⁵⁰

Due to these layers of complication, it would be impossible to make an authoritative list of all possible fair uses that could occur. Instead, visual resources collection should seek to identify what activities clearly violate fair use. These would include, but are not limited to: reproducing and posting non-public domain images on open-access websites; publishing non-public domain images on the Internet, in a journal (academic or otherwise), in a newsletter, etc., without securing the proper permissions; making multiple copies of a copyrighted image—any copying should be limited to a single digital copy, although preservation copies may be made in certain instances under 17 U.S.C. § 108; and preparing and selling to students “course packets” of images,¹⁵¹ unless all of the images are in the public domain.

In addition to identifying what activities are clearly not fair use, visual resources collections should look closely at how courts have interpreted fair use, instead of relying on interpretations from fair use guidelines developed by private, interested parties. Specifically, visual resources professionals should be mindful of the following:

1. “[E]xact photographic copies of public domain works of art would not be copyrightable under United States law because they are not original.”¹⁵²

Any uncertainty regarding whether or not image producers, vendors, and photographers can claim copyright protection for their “exact photographic copies of public domain works” was

150. Crews, *supra* note 69, at 634–35.

151. For the general prohibition of “course packets,” *see* Basic Books, Inc. v. Kinko’s Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

152. *Bridgeman*, 36 F. Supp. 2d at 196.

settled by the *Bridgeman* case.¹⁵³ More specifically, “the extraordinarily exact digital reproduction of public domain art has been held to be unprotectible [sic] as a derivative work, notwithstanding its technological advance, because of its slavish ‘copying.’”¹⁵⁴ For this reason, when a photographer strives to create exact reproductions of another’s artwork, he or she fails to meet the originality requirement for copyright protection under 17 U.S.C. § 102(a). As the court stated in *Bridgeman*, “the originality requirement is not met where the work in question ‘is wholly copied from an existing work, without any significant addition, alteration, transformation, or combination with other material.’”¹⁵⁵ In that case, the court found that the plaintiff had “labored to create ‘slavish copies’ of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality—indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.”¹⁵⁶

In terms of the originality requirement, in the first case where copyright protection was extended to a photograph, the court found that the photograph in question was “an original work of art, the product of plaintiff’s intellectual invention” because the photographer demonstrated the requisite originality “by posing the [subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories . . . , arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, [and] suggesting and evoking the desired expression.”¹⁵⁷ The Supreme Court has more recently observed, however, that “the requisite level of creativity is extremely low; even a slight amount will suffice.”¹⁵⁸

153. *Id.*

154. HALPERN, NARD & PORT, *supra* note 35, at 55 (citing *Bridgeman*, 36 F. Supp. 2d at 191).

155. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421, 426 (S.D.N.Y. 1998), *amended by* 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (quoting MELVILLE B. NIMMER & PAUL E. GELLER, *INTERNATIONAL COPYRIGHT LAW & PRACTICE* § 2[3][b] (1998)).

156. *Bridgeman*, 36 F. Supp. 2d at 197.

157. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

158. *Feist Publ’ns*, 499 U.S. at 345.

While the court's holding in *Bridgeman* extends only to "slavish copies" made from public domain works, a strong argument can be made that claims from photographers or vendors of "slavish copies" of non-public domain works would similarly fail to meet the originality requirement. Indeed, the *Bridgeman* court went on to state that "[a]bsent a genuine difference between the underlying work of art and the copy of it for which protection is sought, the public interest in promoting progress in the arts—indeed, the constitutional demand—could hardly be served."¹⁵⁹ While this will not clear the copyright concerns of the underlying work in such a scenario, at least it may remove one level of possible copyright claims on an image.

A further caveat is that the *Bridgeman* decision extends only to reproductions of two-dimensional works. It is possible, indeed quite likely in most instances, for a photographer to meet the level of requisite originality in capturing a photograph of an architectural work, even one clearly in the public domain. Sculptures, performance pieces, and other such works may pose similar challenges. Thus, the *Bridgeman* holding should only be read in relation to "slavish copies" of two-dimensional works in the public domain.

2. Transformative Uses Are Subject to Deference Under the Fair Use Analysis.

The case law now supports the proposition that transformative uses weigh heavily in favor of a finding of fair use under the first factor. Indeed, "[t]he transformative nature of the use increasingly appears to be the most important criterion, swallowing the other factors."¹⁶⁰ Because visual resources collections are using copyrighted images for a different use than that contemplated by the creator of the underlying work, such a use is arguably transformative. The use of an image of a painting in the classroom context within a lecture presentation, for example, is

159. *Bridgeman*, 36 F. Supp. 2d at 196 (quoting *Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976)).

160. Band, *supra* note 75, at 12.

transformative because it occurs “in a different context”¹⁶¹ and it does not supersede the objective of the original creation. The goal of a painting, to conjure up emotion, to illustrate a particular perception of reality, to document an event, or for pure creative expression, is vastly different from the didactic use of the same painting to educate students about art. Furthermore, many recent cases “affirm fair use . . . especially if there is a strong finding of transformative use.”¹⁶² In the absence of any case law on point, however, this assertion is simply a strong argument, and whether such a use would be considered “highly transformative” is an open question for the courts.

3. *“The creation and use of . . . thumbnails in [a] search engine is a fair use.”*¹⁶³

As an extension of the prominence of transformative uses in the fair use analysis, there is now also a clear line of cases that support the proposition that the use of thumbnail-sized images in a search index or database is fair, even when the index is publicly accessible, and even when the underlying work is copyrighted.¹⁶⁴ This is based on the fact that such a use is highly transformative and it “is not superseding [the copyright holder’s] use but, rather, has created a different purpose for the images.”¹⁶⁵ In the context of a visual resources collection, this means that making an image database with embedded thumbnails is likely a fair use, even if the index and thumbnails are publicly accessible. It is important to ensure that if clicking upon such thumbnails leads to the full-sized image, only enrolled students in individual courses are granted access to such images. Furthermore, it must be emphasized that the holdings of this line of cases extend only to thumbnail images.

161. *Wall Data*, 447 F.3d at 778.

162. Gerhardt & Wessel, *supra* note 3, at 499 n.124 (collecting cases).

163. *Kelly*, 336 F.3d at 815.

164. *See Perfect 10*, 487 F.3d at 701; *Bill Graham Archives*, 448 F.3d at 605.

165. *Kelly*, 336 F.3d at 819.

4. *Cache copies are fair if they are a necessary means to a fair use end.*

Particularly in the digital realm, concern has been raised about the “invisible” intermediary copies of images that are made when images are saved, downloaded from databases, uploaded onto screens, etc. However, the Ninth Circuit recently agreed that “the cache copy made by a user’s browser whenever he viewed a webpage is a fair use.”¹⁶⁶ Specifically,

[t]he copying function performed automatically by a user’s computer to assist in accessing the Internet is a transformative use. Moreover, as noted by the district court, a cache copies no more than is necessary to assist the user in Internet use. It is designed to enhance an individual’s computer use, not to supersede the copyright holders’ exploitation of their works.¹⁶⁷

Thus, once it has been determined that the end use of an image is likely to be considered fair, there should not be any concern about intermediary copies required to achieve that fair use. While this will relieve anxiety about the fairness of background reproductions produced by a computer, it must be emphasized that these cache copies are only considered fair if the actual use of the image is a fair one.

5. *Reproduction will likely not be a fair use if an item is commercially available.*

It is important to note that for all image needs, commercial sources of images should be exhausted first. In *American Geophysical Union v. Texaco Inc.*, the fact that Texaco could easily extend their subscription for journal articles instead of

166. Band, *supra* note 75, at 9.

167. *Perfect 10*, 487 F.3d at 726.

making copies worked in American Geophysical's favor.¹⁶⁸ Because many images required for courses are not readily available, or are prohibitively expensive, the situation in visual resources collections may be quite different from the licensing of readily available textual materials in commercial databases. However, when images are available they should be purchased. At that point, use will be governed under contract law in accordance with the attendant license agreements.¹⁶⁹ Other means of acquisition when images are available for purchase will likely not be considered fair.

6. Under the third fair use factor, use of the entire image is not dispositive.

Because instructors generally require the use of an entire work, the third fair use factor weighs against a finding of fair use in the visual resources context. However, “[t]he amount and substantiality of the portion used has less relevance, particularly if the use is transformative.”¹⁷⁰ In *Perfect 10* and *Bill Graham Archives v. Dorling Kindersley Ltd.*, the court found fair use despite the fact that in both cases “the user used entire works. Indeed, in *Perfect 10*, Google allegedly used the entirety of thousands of images (albeit in compressed form).”¹⁷¹ Thus, if a use is sufficiently transformative, the amount and substantiality will figure less prominently in the fair use analysis. Nevertheless, the holdings in *Perfect 10* and *Bill Graham Archives* must be read in light of the fact that the court first found that the use of the images in question was “highly transformative” before proceeding to discount the impact of the third factor.

168. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 924–25 (2d Cir. 1995).

169. See generally HARRIS, *supra* note 19 (describing the legal context of licensing digital content).

170. Band, *supra* note 75, at 14.

171. *Id.*

D. Constitutional Policy Arguments

In addition to the copyright considerations for education made explicit in the Copyright Act, the constitutional policy arguments for the educational use of images are compelling. One of the most obvious ways to “promote the Progress of Science and useful Arts”¹⁷² is of course through educational activities, which is why copyright law grants leeway for such activities, especially through the fair use doctrine.¹⁷³ The prominence of education is firmly rooted in our copyright jurisprudence; indeed, the

very first copyright statute, the Statute of Anne, on which our system was initially modeled, began with the words, “[a]n act for the encouragement of learning.” Our nation’s Founders similarly thought that protecting copyrights would enhance education. . . . Evidence of this belief that copyright was designed to be consistent with the educational mission is also reflected in the first federal copyright statute of 1790 which began, like the Statute of Anne, with the words, “[a]n Act for the encouragement of learning.”¹⁷⁴

It would be the height of irony if in the process of educating budding artists, the epitome of the creative “author,” an institution was challenged with copyright infringement because the instructor scanned an image of an artwork and displayed it in the classroom setting for instructional purposes. If obtuse restrictions, such as those enunciated by the CONFU guidelines, are placed upon the use of images in education, many courses simply will not be taught, thereby retarding “the Progress of Science and useful Arts” rather than promoting it. For example, if a professor wishes to teach a course about a recently deceased artist, and must wrestle permissions from the artist’s estate for every image he or she seeks

172. U.S. CONST. art. I, § 8, cl. 8.

173. *See infra* Part III.F.

174. Gerhardt & Wessel, *supra* note 3, at 527 (quoting Statute of Anne, 1710, 8 Ann., c. 19 (Eng.); Act of May 31, 1790, ch. 15, 1 Stat. 124).

to use for the course, or pay for each use, the course will simply not be offered. Although these are conceptual considerations, it is vital that the constitutional underpinnings of our copyright law are considered when copyright policies are developed at institutions of higher learning. It should be recalled that the Supreme Court has asserted that

[t]he monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.¹⁷⁵

Education, especially education in the arts, is the chief motivation of creativity.

VII. CONCLUSION

Educational activities hold a privileged place in copyright law and the framers' recognition of education as a tool of progress must be respected. While visual resources collections are not entitled to an unbridled, undisciplined approach to the acquisition and use of copyrighted works, they are entitled to organized, systematic fair uses of materials for educational purposes. To achieve this, visual resources collections must insist that the Copyright Act itself guide their activities, rather than external pressures. This involves a rejection of the mainstream fair use guidelines and a closer examination and deeper utilization of the exceptions available for libraries, archives, and teaching. It also entails identifying uses that are clearly not fair, while delineating the parameters of fair use based upon judicial interpretations.

175. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

